No. 2850

In the United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Appellant,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "Princess Victoria," her engines, etc., PACIFIC ALASKA NAVIGATION COMPANY (a corporation), and ALASKA PACIFIC STEAMSHIP COMPANY (a corporation), claimants,

Appellees.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "Princess Victoria," for Limitation of Liability.

BRIEF FOR APPELLEE, CANADIAN PACIFIC RAILWAY COMPANY.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Appellee, Canadian Pacific Railway Company.

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BRIEF FOR APPELLEE, CANADIAN PACIFIC RAILWAY COMPANY.

On August 26, 1914, the steamers "Admiral Sampson" and "Princess Victoria" collided in the waters of Puget Sound, as a result of which collision the steamer "Admiral Sampson," together with her entire cargo, became a total loss. Immediately after the

happening of the said collision, the owners of the "Admiral Sampson" libeled the "Princess Victoria," claiming damages in the sum of $670,000 (Ap. p. 8). On August 29th, after the filing of the aforesaid libel, the Canadian Pacific Railway Company, as owner of the Steamship "Princess Victoria," filed a petition for a limitation of its liability. Monition was duly issued and published. Appraisers were appointed and the interest of this appellee as such owner was fixed at the sum of $286,225.10, and, on November 5, 1915, an interlocutory decree was entered limiting this appellee's liability to the said sum of $286,225.10. On January 26, 1915, the appellant herein, as insurer of cargo aboard the "Admiral Sampson" at the time of her loss, filed its claim in said limitation proceeding for the sum of $31,407. On August 26, 1915, a stipulation was entered into between this appellee, as owner of the steamship "Princess Victoria," Pacific Alaska Navigation Company and Alaska Pacific Steamship Company, as charterer and owner, respectively, of the steamship "Admiral Sampson," as parties of the first, second and third parts, respectively, and Fireman's Fund Insurance Company and other insurers of cargo, as parties of the fourth part, wherein it was agreed that as to the claim of said appellant and other insurerers of cargo, the mutual fault of both of said colliding steamers was admitted; and further, that the said cargo claimants should be paid in full before any portion of the claims

of the other parties was paid, and that unless the amount of the cargo claims were agreed upon, the same should be established by competent proof. (Ap. pp. 24-26.) Thereafter, on June 12, 1916, a further stipulation was entered into between the same parties fixing the amount of the claims of said cargo claimants—the claim of this appellant being fixed at $31,-392.04. It was therein agreed that the appellant and other cargo claimants:

> "Contend that they are entitled to recover, in addition to the principal amount of their respective claims as aforesaid, interest thereon at the rate of 6% *from the several dates of payment of the items constituting their respective claims,* and the fourth parties further contend that they are also entitled to recover their taxable costs. First, second and third parties deny the right of fourth parties to recover interest and costs as contended for by fourth parties." (Ap. p. 32.)

And in order to finally dispose of said claims it was further stipulated that the court might enter a decree allowing the respective cargo claims in the amounts stated in said stipulation, and that "the question of the rights of fourth parties to recover interest and costs as aforesaid shall be submitted to the court for determination."

These questions were submitted to the court in accordance with said stipulation, on June 12, 1916, and the lower court, after said questions had been fully argued and submitted to it, on the same date, made its oral decree fixing the amount of the claims

"with costs and interest from June 12, 1916, but without interest prior to said date." Some months thereafter, on Aug. 24, 1916, a written decree was prepared and filed in the cause in accordance with said oral decree (Ap. pp. 33-35). This appeal is from that portion of the decree of the lower court disallowing interest prior to June 12, 1916. The principal amounts of the respective cargo claims, including the claim of this appellant, together with taxable costs, have been fully paid and the sole question before this court on this appeal is that of the disallowance of interest on appellants claim prior to June 12, 1916.

ARGUMENT.

Appellant contends that it is entitled as a matter of right to interest on its claim from the *date of the collision* to the date of the final payment. The court will note, however, that this was not the contention of the appellant in the lower court, and that no such question was presented to or passed upon by the lower court. The stipulation of the parties agreeing to the submission of this case to the lower court prior to the final hearing of the entire cause, dated June 12, 1916, expressly provides in paragraph 2 thereof that the appellant contends that it is entitled to interest on its claim from *"the several dates of payment of the items constituting such respective claims."* (Ap. p. 32.)

This stipulation as to appellant's contention, was all that appellant and other insurers of cargo, could

legally claim. An insurer of cargo does not stand in the same position as a cargo owner. An insurer's claim arises on the date when he pays the loss. To allow an insurer interest on the amount of a cargo loss *prior* to the time when such insurer has actually paid such loss would be contrary to the doctrine well established in this county that

> "The insurer's right of subrogation in equity could not extend beyond recoupment or indemnity for the actual payments to the assured."
>
> *The St. Johns,* 101 Fed. 469, 475,
> *Norwich Union Fire Ins. Co. v. Standard Oil Co ,* 59 Fed. 984,
> *Fairgrieve v. Marine Ins. Co.,* 94 Fed. 686,
> *The Livingstone,* 130 Fed. 747.

Any doubt on this question, however, is foreclosed by appellant's stipulation as to its contention below. It is elementary law that this court will not consider a question which was not presented to or considered by the lower court.

> *Benedict on Admiralty* (4th Ed.) §566.

The lower court, with the entire record in this cause before it, and upon the stipulation of the parties as to the questions to be presented to it, decided that cargo claimants, including this appellant, were not entitled under the circumstances of this case to an allowance of interest from the dates when they had paid the respective cargo owners the amount of their respective insurance. That was the sole question before

the lower court and, of course, is the only question which appellant can raise in this court. The record which appellant has brought to this court does not show the date or dates when the appellant paid cargo owners, which were insured by it, the amount of their respective claims.

The record which appellant has brought to this court shows that appellant's claim herein covers amounts paid by it on twenty different shipments of cargo (Ap. p. 21-22). But it nowhere shows the "several dates of payment of the items constituting such respective claims." There is, therefore, nothing in the record before this court upon which it could base an allowance of interest.

ALLOWANCE OF INTEREST, AS DAMAGES, IN ADMIRALTY CASES IN DISCRETION OF TRIAL COURT.

The Admiralty Courts of this country have uniformly held that the allowance or disallowance of interest and costs in collision cases is in the sound discretion of the trial court dependent upon the equities and circumstances of each particular case. Neither a ship owner nor a cargo owner is entitled to either interest or costs as a matter of *right* in such cases, and when interest is allowed it is allowed as a part of the damages and not strictly as interest.

In *The Scotland,* 118 U. S. 507, (being second appeal to the U. S. Supreme Court of case referred to by appellant on page 6 as *Dyer v. National Steam Nav. Co.,* Fed. Cas. 4225, and again on page 5, as *The Scotland,* 105 U. S. 24), the Supreme Court passing upon the contention of claimants, in a Limitation of Liability case, that they were entitled to interest on the amount received from the strippings of a sunken vessel, stated:

"Were the libellants entitled to interest on the amount received from the strippings? In answering this question it must be borne in mind that this *is not* a *question of debt, but of damages.* The limitation of those damages to the value of the ship does not make them cease to be damages. The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case and rests very much in the discretion of the tribunal which has to pass upon the subject whether it be a court or a jury (at pages 518-519)

"In Admiralty, interest on claims arising out of breach of contract is a matter of right, but the allowance of interest on damages in cases of collision or other *unliquidated* damages is always in the discretion of the Court and may be allowed or disallowed by the District Court.

Benedict on Admiralty (4th Ed) §474.
The Albert Dumois, 177 U. S. 240, 255,
Hemenway v. Fisher, 20 How. 258,
Burrows v. Lownsdale, 133 Fed. 250,
The Eliza Lines, 132 Fed. 242.

"While interest is allowable, as a matter of right, on claims arising out of contract, the allowance of interest by way of damages in cases of collision and

other cases of pure damages, as well as the allowance of costs, is in the discretion of the court."

Bethell v. Mellor, etc. Co., 135 Fed. 445.

This court, in the case of *La Conner Trading & Transportation Co. v. Wedmer,* 136 Fed. 177, refused to consider the action of the lower court with respect to the allowance of interest on damages, upon the ground that such action was discretionary with the trial court.

"The allowance of interest on damages depends upon circumstances, and rests in the discretion of the Court. *The Scotland,* 118 U. S., 507, 518 (at p. 178)."

See also *Thompson Towing & Wrecking Assn. v. McGregor,* 207 Fed. 209—note bottom page 221,
The Argo, 210 Fed. 872, 875.

NO APPEAL LIES FROM DECREE DISALLOWING INTEREST, WHERE THAT IS THE SOLE QUESTION INVOLVED.

It has been uniformly held that the giving or withholding of *costs and expenses* is a matter in the sound discretion of the trial court and is not subject to review where that is the sole question involved.

In the early case of *Canter v. Insurance Co.,* 3 Pet. 307, the Supreme Court of the United States held that the allowance of costs and expenses

"are not matters positively limited by law, but are allowed in the exercise of a *sound discretion* of the

court, and besides, it may be added that *no appeal* lies from a mere decree respecting costs and expenses."

This has since been the uniform holding of Admiralty and Equity Courts.

Elastic Fabric Co. v. Smith, 100 U. S. 110,
Paper Bag Machine Cases, 105 U. S. 766,
Russell v. Farley, 105 U. S. 433,
Du Bois v. Kirk, 158 U. S. 58,
The Eva D. Rose, 166 Fed. 106.

The matter of costs and expenses not being *per se* the proper subject of appeal, can only be considered by an appellate court, incidentally as connected with an appeal on the merits.

U. S. v. Brig Malek Adhel, 2 How. 210, 237,
Blassengame v. Boyd, 178 Fed. 1, 5.

"In equity and in admiralty the taxation of costs, as between the parties, is a matter of sound legal discretion, and for this reason it is said that generally an appeal will not lie alone from a decree taxing costs (citing cases). But if the appeal be also upon the merits, the Court having the whole decree before it, may also consider the action of the Court in this respect, upon a proper assignment of errors (citing cases)."

In re Michigan Cent. R. Co., 124 Fed. 727, 732,
The Scotland, 118 U. S. 507, 519.

The reason for this rule is apparent. An appellate court will not entertain an appeal where the *sole question sought to be reviewed was a discretionary act of the lower court.*

In the case of *In re Michigan Cent. R. Co.,* 124 Fed. 727, cited from above, the court clearly points out the reason for this rule.

"But in all cases cited, except that of *Wood v. Weimer, supra,* the taxation was between the parties in either admiralty or equity causes, and the *only question was as to the exercise of a sound discretion* in the disposition of the costs as between the parties. *The ground upon which the right of appeal was denied was because the question was not one of positive law, but of discretion.* (Italics ours.)

In re Michigan Central R. Co., 120 Fed. at p. 732.

"When a matter is in the discretion of the court, the exercise of that discretion is not reviewable in the appellate court."

Cape Fear Towing & Trans. Co. v. Pearsall, 90 Fed. 435, 437,
Charles v. United States, 183 Fed. 566.

In the case at bar, appellant has not appealed on the merits, but only from that portion of the decree disallowing interest prior to the decree, i. e., from the decree of the lower court refusing to allow the full amount of damages claimed.

The reason for the rule applies even more forcibly to the discretionary act of a trial court in disallowing interest as part of damages claimed than it does to the allowance of cost and expenses. Certain items of cost are now fixed by statute and follow a decree as a matter of right and are thus no longer discretionary with the trial court.

In re Michigan Central R. Co., 124 Fed. 727. Interest, however, is in all cases discretionary. A trial court with the entire litigation clearly before it is in a particularly advantageous position to understand the equities as between the litigants, and with such understanding to exercise its discretion as to the equity of allowing or disallowing interest to such litigants.

If an appellant court will not entertain an appeal respecting costs and expenses alone, upon what principle could it entertain an appeal respecting interest alone? In both cases the action of the trial court in the premises is purely discretionary, and the appeal is from the well established discretionary power of the court.

THE APOSTLES DO NOT SHOW THE "CIRCUMSTANCES OF THE CASE" WHICH GUIDED LOWER COURT IN EXERCISING ITS DISCRETION.

Appellant contends, however, that an appellate court not only has the power to entertain an appeal respecting *interest alone,* but that in a "clear case" such appellate court should allow a cargo claimant such interest as a matter of right. This, we think, is not the rule, but even though it were, it would have no application here.

Appellant comes before this court with the barest skeleton of a record and from such record argues that under the "particular circumstances" of this case the lower court abused the discretion inherent in it, by disallowing interest. This raises a pure question of fact, with absolutely no record from which this court can determine what the actual facts were which guided and influenced the lower court in exercising its discretion.

This litigation has been pending for over two years—it was a most serious collision—not only was the "Admiral Sampson," together with her cargo, totally lost, but many lives and much other property were lost as well. (ap. p. 6.) The litigation arising from such a disaster would necessarily be very extensive. This entire litigation was before the lower Court. None of it, excepting this one claim, out of a hundred, is before this court, and this one in its merest skeleton form.

It would be absurd to argue that this Court, from the record before it, was conversant with the "particular circumstances" of this case, so as to enable it to say, as a matter of fact, that the lower Court, in disallowing interest, acted "arbitrarily", without "adequate reason," "capriciously" or without "reasonable cause." Appellant would have this Court so find.

Appellant says (p. 14 of its brief):

"In a plain case such as the one now before the Court discretion has no office to perform. Its exercise is limited to doubtful cases where an impartial mind hesitates."

In making this statement appellant apparently refers to the case as disclosed in its Apostles on Appeal. These apostles show merely that after the happening of this collision, this appellee, as the owner of the Steamship "Princess Victoria," which had been libeled for a sum greatly in excess of the value of said steamer and which was being threatened with numerous other libels, filed a petition for limitation of its liability, if any, and prayed for a total exemption of liability; (Ap. pp. 4-12) that monition was duly issued and returned; (Ap. pp. 13-16) and that some months thereafter, or on January 27, 1915, this appellant filed its claim for $31,407. (Ap. pp. 16-23.) No further proceedings of the Court in the premises are shown until August 26th, 1915, when a stipulation was entered into, the result of which being an agreement on the part of this appellee and the owners of the "Admiral Sampson" to pay the claim of appellant in full as soon as the same could be agreed upon .(Ap. pp. 24-26.) That a decree was subsequently entered limiting the liability of this appellee; (Ap. pp. 27-29) that on June 12th, 1916, a further stipulation was made fixing the amount of this appellant's claim *at less* than the amount of the claim as filed, and agreeing that the

question of appellant's right to interest from the date when it had actually paid the respective items of its claim and the question of its right to taxable costs should be submitted to the Court. (Ap. pp. 30-33.) That on the very date (June 12, 1916) when appellant's claim was agreed upon, in accordance with the prior stipulation of the parties, the remaining contentions as to appellant's right to interest and costs were submitted to and determined by the lower Court. (Ap. pp. 33-35.) There is absolutely nothing in the record before this court to show what influenced this appellee to enter into the stipulation of August 26, 1915, admitting its liability and agreeing to pay the appellant in full. This stipulation is distinctly to the advantage of the appellant. It relieved appellant from the necessity of litigating its claim and established the liability of this appellee to pay appellant's claim when agreed upon. The "Admiral Sampson" having become a total loss, appellant's only chance of recovering any damages in this litigation was to establish the liability of this appellee. That liability had been strenuously denied by this appellee and a considerable amount of testimony had been taken in the case. Can this Court say what the facts and circumstances were which moved this appellee to waive its entire defense and to admit its liability as to this appellant, and to absolutely agree to pay its claim without qualification upon the correctness thereof being agreed upon?

The Court, in this connection, will note that this stipulation is in favor of appellant and the other cargo claimants alone, and that as to the numerous other claims for death, personal injury and loss of property, etc., this appellee did not admit any liability whatsoever.

We contended below that this stipulation, in connection with the circumstances causing appellee to agree thereto as well as numerous other facts which were before the lower court, estopped appellant from claiming interest prior to June 12, 1916. It is apparent from the decree of the lower Court that it agreed with our contention, and, in the exercise of its discretion, denied the appellant's contention insofar as the same related to interest, but did allow the appellant its taxable costs, which, together with its principal claim, have been fully paid.

Appellant may claim that the appellee is foreclosed from raising this question, by reason of its signing the stipulation as to contents of the apostles on appeal, which stipulation contained the following clause:

"The apostles on appeal may contain only such papers and proceedings as are necessary to review the question raised by the appeal of said Fireman's Fund Insurance Company, the same being,"

the particular papers set out in the stipulation, and contained in the apostles.

It is true that we signed this stipulation on behalf of appellee, as we considered that the papers therein mentioned were sufficient to raise the legal question sought to be reviewed by the appellant; but we certainly did not intend to stipulate, nor did such stipulation so state, that the bare pleadings set forth in said apostles are sufficient to lay the entire "circumstances" of the case before this court, so as to enable this court to determine therefrom as a *matter of fact* whether or not the lower court had abused its discretion.

The authorities are uniform that the allowance of costs and interest, in a collision case, are within the discretion of the trial court. The apostles are sufficient to raise this legal question. This being the only legal question before this court, we think that such authorities are conclusive on this appeal.

As to the question of fact contended for by appellant, we contend that the apostles in this case do not show that "circumstances of the case" sufficiently to enable this court to pass upon the same.

"We are without any means of knowing the circumstances in the pleadings or the evidence upon which the Court was called upon to act, except the bare facts stated in the findings of fact before referred to. The right to a limitation of liability seems to have been denied to the respondent from the beginning. If it offered to pay the value of the strippings into court in its discharge from liability, or desired to do so, it is evident that the Court would not allow

it to do so, and that libellants resisted it with all their power. The respondent was obliged to wait till the decision of this court in March, 1882, before getting a declaration of its rights in the matter; and the first move afterwards made was the attempt of the libellants to change the whole form of the controversy by setting up the new claim to the insurance money received by the respondent. Without stopping to decide whether this amendment of the proceedings was lawfully allowed after the decision of this court, it is sufficient to say that the Circuit Court, *so far as we have anything before us to show to the contrary, may have had very good reasons for not allowing interest* on the value of the strippings. We are not disposed to disturb its decree in this respect." (Italics ours.)

The Scotland, supra.

It was formerly considered that an appeal in an admiralty case was a trial *de novo* in the Circuit Court of Appeals, but in this circuit such does not now seem to be the rule.

"The Circuit Court of Appeals Act created a court which was entirely a court of review, and which did not execute its own decrees. Assignments of error were required, and the statute, and the general rules propounded for the Circuit Courts of Appeal by the Supreme Court, made no provision for new pleadings or new evidence. And so, in some of the circuits, an appeal in admiralty has not been regarded as a trial *de novo,* but as a review of the decree of the Court below on point of law only. The Ninth Circuit has held that findings of fact, made by the District Court on conflicting evidence, will not be disturbed on appeal, unless clearly contrary to the evidence, which holding is inconsistent with the idea that an appeal is a new trial, *Benedict on Admiralty,* 4th Ed. §566, citing:

"The Alijandro, 56 F. R. 621; *Whitney v. Olsen,* 108 F. R. 292; *Jacobsen v. Lewis Klondike Ex. Co.,*

112 F. R. 73; *Alaska Packers' Assn. v. Dominico,* 117 F. R. 99; *The Oscar B.,* 121 F. R. 978; *Paauhau, Etc. v. Palapala,* 127 F. R. 920."

It being the uniform holding of this court that it will not disturb a finding of the lower court, where the same is based upon conflicting evidence, certainly this court would not disturb a finding in the discretion of the lower court where none of the facts guiding or influencing the lower court in arriving at such finding are before this court.

This matter of the allowance of interest and costs to appellant and other "cargo claimants," was submitted to the lower court entirely on oral arguments and the court's decision rendered immediately after such oral arguments was given orally.

The Court's reasons for disallowing interest on this claim are therefore not before this court. As a matter of fact, the written decree disallowing interest was not entered until months later, or August 26, 1916, at which time appellant decided to prosecute this appeal and desired *some record* upon which to base an appeal.

If appellant desired to base its appeal on the question of fact, i. e., abuse of discretion by the lower court under all the "circumstances of the case," it was in its power to do so by bringing up the *entire* record in the case. This, however, would have involved an expense out of proportion to the amount of its claim. Having elected to stand on the legal question of the power

of the lower court to disallow interest on its claim, which is the only question raised on the apostles before this court, it must abide by its election.

The repeated statement in appellant's brief that it has been compelled to wait for over two years for the amount of its claim "admittedly due it" is not correct. The appellant's claim was not filed in this proceeding until January 27, 1915, or five months after the appellee filed its petition for limitation, and the liability of appellee as to this appellant alone was not determined until August 26, 1915, or approximately a year after the appellee filed its petition for limitation.

It will further be noted that the stipulation admitting liability as to appellant contemplates an agreement as to the amount of the appellant's claim, and that the amount of this claim was not agreed upon until June 12, 1916, upon which date a decree fixing the same was entered. Appellant was not compelled to litigate its claim, and the record shows that as soon as competent proof of the claim was furnished so that an agreement could be arrived at, such agreement was promptly made and a decree entered.

The only laches in connection with the establishment of this claim was upon the part of appellant.

It will further be noted that the claim as agreed upon is less than the claim asserted by appellant, so that if appellee had, as contended for by appellant,

been compelled to pay this claim when filed, it is apparent that appellee would have been compelled to pay more than appellant admitted, to have been due it.

We have been unable to find a single admiralty case where an appeal involving interest alone has been considered nor has appellant cited any such case. Where such a question is incidental to an appeal on the merits it has in rare cases been considered, and then only in a "clear case" of abuse of discretion by the lower court.

In the case at bar, "interest" is the only question involved; the allowance of interest being in the sound discretion of the lower court is not *per se* subject to review.

If this court should hold otherwise then we confidently assert that the record before this court does not disclose a "clear case" of abuse of discretion within the rule announced in the *Albert Demois, supra,* that

"The allowance of interest in admiralty cases is discretionary and not reviewable in this court except in a *very clear case.*"

We respectfully submit that the decree of the lower court should be affirmed.

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